No. 3597

United States Circuit Court of Appeals

LEMUEL S. FOWLER AND THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

PETITION FOR RE-HEARING

JOHN F. DORE,
of Seattle, Washington,
Attorney for Plaintiffs in Error.

Kelly Printing Co., 90-92 Washington St., Seattle

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For the Ninth Judicial Circuit

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the plaintiffs in error, Lemuel S. Fowler and Thomas Singer, and respectfully petition this court for a rehearing of this cause, decided by your Honors on the 16th day of May, 1921, and to that end respectfully show:

The court says:

> "It is well settled that a formal agreement of the parties concerned is not essential to the formation of a conspiracy. It is sufficient if there be a concerted action of the parties, working together understandingly, with a single design, for the accomplishment of a common purpose."

This correctly states the law of conspiracy. But we feel aggrieved, because it seems to us your Honors, after stating the law correctly, have failed to see it correctly applied. It appears to us the court has committed the very error the government committed in the court below, and in the application of the law has confused "concerted" action with "similar" action, and "common" purpose with "similar" purpose. To illustrate: Stealing constantly goes on in a city the size of Seattle. It is not uncommon for six thefts to occur in a single night. At other times a single theft may occur for a series of six nights. In either case the thefts *may be,* true, the result of a conspiracy. But not necessarily, or probably, so. Common character of the crime does not make it so, or even indicate it. Nor does time have any probative effect. The fact either that all occurred in one night, or that they occurred in a series of nights, has no force of proof.

There must be *concerted action,* an action *toward a common end,* an end common to all the actors, before a conspiracy can be said to exist. Your Honors will not disagree with us upon this point.

The evidence then must decide whether a series of thefts is a coincidence or the result of a conspiracy.

The theory of the government was well stated by the court:

> "The theory of the government is plain, namely, that there was manifestly an organized group of evil-disposed persons, who had for their purpose the looting of freight and express trains and cars and the disposition of the spoils to avail themselves of the profits of their engagement. So it was that many persons were charged with conspiring to engage in the unlawful enterprise."

But it is one thing to say of a series of thefts that they are the result of a conspiracy and quite another to prove the fact. The assertion is easily made. If the proof is difficult it is usually because the assertion is untrue.

It may be conceded without going further that larceny of goods from the railroad was practiced to no small extent in and about Auburn; that some of the defendants were guilty of these thefts; and that the government showed a conspiracy to have existed between two or more of the defendants. But the government did more. It showed several conspiracies. Starting with the theory of one grand conspiracy, into which it dragged the names of all the defendants, the proof it offered showed several distinct and independent thefts, connecting them sometimes, but not always, with two or more of the defendants, but no two conspiracies or thefts being connected together by any formal proof. That the facts actually shown failed to measure up to the government's theory of a grand conspiracy is shown conclusively by the action of the court in dismissing three of the defendants, after the evidence was in, and by the verdict of the jury in acquitting a majority of the remainder.

The lower court acted wisely in discharging the three defendants, and the jury made no mistake in acquitting those acquitted. On the other hand, some of those convicted were rightly convicted. But a wrong was done Singer and Fowler.

Tom Singer is a hairdresser and proprietor of a "beauty parlor" in the City of Seattle. Edward Bourdell, a railroad man living at Auburn, purchased from Singer in Seattle a wig, and in payment therefor gave him an overcoat. The overcoat was a stolen coat, though Singer professes not to have known that fact. If guilt must be predicated of him at all, he is guilty of receiving stolen property at most. But Singer stands convicted of a conspiracy to loot railway trains in and about Auburn! The explanation is not hard. Bourdell confessed in court his guilt *of looting,* went home and committed suicide! The jury, not given to too close reasoning, doomed Singer with him, not because either was in a conspiracy as charged, but because Bourdell was a thief and Singer had dealt with him.

It is important to him that the court consider well the point urged that the jury should have been restricted to a consideration of the conspiracy proved, and we respectfully ask a reconsideration of the point.

As to Fowler, it may be said with equal fairness, he is not guilty of the offense charged. He was in possession of certain automobile tires, shown

to be stolen tires. How, where or when he got them is not known, except as he told the story, which the jury evidently failed to believe. But the transaction with reference to the tires is the only one in which he was in any way involved. Ayers, the railroad, detective, learning of his possession of the tires, arranged to help him sell them, evidently figuring that such would involve Fowler criminally, but how is not clear. In arranging the deal he took Fowler and his tires to Renton at the same time that he took Ratcliff and Hanson with the shoes. Ratcliff pleaded guilty, and the jury convicted Fowler, though Ratcliff testified flatly that he had been in no conspiracy or dealings with Fowler, and no one else connected him with any other transaction. Fowler is not guilty, your Honors, unless living in a railroad community where thieving is pretty general makes all guilty of "conspiracy."

We respectfully urge a reconsideration of the record for these two petitioners.

Respectfully submitted,

JOHN F. DORE,

Attorney for Petitioners.